Publishing and the law: Copyright and globalisation

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Abstract

The global copyright landscape has evolved in many respects over the past two decades, but the territorial nature of copyright law remains an important and often perplexing consideration for authors and publishers. Jurisdictions being subject to their own different copyright legislation, advances in digital technology, international publications, and the advent of e-books have raised issues regarding the enforcement of copyright laws across jurisdictional borders. This changing publishing environment has impacted the application of copyright laws, with diverse opinions on the desirability of enforcing strict controls versus proponents of free models. It has also affected authors of printed books' copyright protection, with some authors struggling to come to grips with breaches of copyright outside the protection of their own borders. Additionally, the extra-territorial publication of books is often in breach of authors' jurisdictional copyright legislation, but difficult to address locally. This chapter deals with the copyright issues faced by authors and publishers in the digital sphere, as well as the difficulties associated with overseas publications of their books from a territorial perspective. It examines the effectiveness of territorial copyright protection in the digital economy and considers whether the culture of the book may be eroded through the prevalence of extra-territorial publications. It also considers future developments in digital copyright protection, such as smart contracts and blockchain solutions.

Introduction

The evolving global publishing landscape has not only affected the ways in which authors disseminate their work but has also impacted significantly on how copyright is enforced across jurisdictional borders. Authors of written work face increased challenges in protecting their copyright due to technological advances, and the extra-territorial publication of books that are sold online exacerbates copyright concerns.

This chapter deals first with the impact of electronic publishing across borders and what this means to authors in relation to their copyright. It postulates that, while technological advances have positively impacted on the availability and accessibility of books and increased publishing opportunities for authors, there have been corresponding negative consequences. Problem areas for authors have included pirating of their work on the internet through unauthorised copying, as well as a lack of knowledge on digital publishing and copyright protections on the internet. This chapter considers authors' views on copyright issues in the digital sphere, based on previous studies in this area of the law by the author and others (Cantatore 2014; Pappalardo et al. 2017); current copyright solutions such as licencing options and "free models," and more recent proposed initiatives such as "smart contracts."

Second, the issue of extra-territorial print publications is examined in relation to authors' copyright, as traditional publishing also faces cross-border issues which cannot always be readily resolved. This global trend in publishing extra-territorially may lead to territorial copyright infringements. One increasing problem faced by Australian authors and publishers is unlawful parallel importing of printed books, which is difficult to monitor, especially in relation to sales on sites such as Amazon. Additionally, digital copies of books are not captured by the parallel import restrictions.

Parallel import restrictions (PIRs) apply in the US, Australia, Canada, and the UK but, in reality, these provisions are often breached by wholesalers or discounters who import illegally printed copies of books from the other jurisdictions into Australia and sell books as "remainders" at discounted prices. In these instances, authors do not benefit from royalties. These foreign-published books offered to Australian consumers effectively bypass the PIRs and are often text books with poor quality printing and binding. In other cases, books are lawfully published for an overseas market, and are then imported back into the country in breach of PIRs, or sold online across territorial borders at cut-rate prices. These books are sold in competition with Australian publishers, who suffer losses as a result. The Productivity Commission (2016) has once again[1] recommended that Australia lift PIRs on books but, at the time of writing, the issue was still under consideration by the Australian government.

In Australia, the issue of selling printed books on the internet has not yet been addressed in court but in the US case of Kirtsaeng v John Wiley & Sons, Inc, 133 S.Ct. 1351 (2013) the Supreme Court held that Kirtsaeng's sale of lawfully-made copies purchased overseas was protected by the "first-sale doctrine" under US law. The decision has had a far-reaching impact on authors and local publishers in the US, and publishers globally. The case provided a clear illustration that the availability of books online and cross-border selling may affect the application of territorial copyright measures, essentially rendering them ineffective in practice. Thus, in addition to digital concerns, this chapter also aims to provide insights on territorial copyright issues in relation to printed books, with reference to a study conducted with a purposive sample of published Australian authors (Cantatore 2014), and to the diverse views expressed in response to the Productivity Commission recommendations to abolish PIRs.

[1] Echoing its previous recommendation in 2009 (Productivity Commission 2009).

Copyright in the New Publishing Landscape

In the context of globalisation, it should be stated at the outset that there is no concept of "international copyright" that automatically protects authors' copyright globally. Instead, copyright protection is territorial in nature and relies on the laws of individual countries for protection in that country. For example, in the US the *Copyright Act 1976* (together with a number of other statutes) regulates copyright use; in Australia, the *Copyright Act 1968* (Cth) (the Act) applies. Copyright in a literary work is specifically protected under section 31(1) of the Act. The Act regulates how creative work may be copied and distributed, and under which conditions, and aims to strike a balance between the public interest in promoting creativity and the interest of creators to be compensated for their work. The Australian copyright system is intrinsically utilitarian in nature; this has previously been noted by the Intellectual Property and Competition Review Committee (2000, 32), which also recognised that the general objective of the intellectual property law system in Australia was more specifically economic, rather than moral in character. The legislature, through this approach, has striven towards balancing the rights of creators with public benefit (i.e. the use and enjoyment of their creations).

This approach necessarily provides for an ongoing tension between perceptions of "authors' rights" and "users' rights," where the limitations should lie, and how authors can enforce their copyright in the global publishing sphere. Authors' "moral rights" is also an issue dealt with under the Act (section 189), with corresponding concerns arising about protection of these rights in a digital environment. The Australian system has been described as "a hybrid system with authorial moral rights grafted onto a framework that has developed to protect the economic interests, not of the author, but the copyright owner" (Adeney 2002, 10). These perceptions have given rise to concerns by authors that their interests are not always adequately protected.

In respect of global copyright protection, most developed countries (including the US and Australia) are members of an international copyright treaty, the *Berne Convention for the Protection of Literary and Artistic Works 1886* (as amended) (Berne Convention), where copyright works are defined as "literary and artistic works" (articles 2(1), 102). Under article 7(8) of this treaty authors receive recognition for their foreign rights under the "national treatment" requirement, which provides that a qualifying "foreign work" must receive the same protection as a "local work" Thus, member States' copyright laws should have certain "minimum standards" of copyright protection to comply.

In practice, however, it has become apparent that digital publishing models and global book sales have eroded these principles and have impacted on authors' ability to protect and monetise their copyright internationally. Digital publications have proven difficult to regulate due to the prevalence of cross-border digital sales in the global marketplace. Logistical issues such as the prohibitive cost of pursuing copyright breaches in other jurisdictions mean that authors and smaller publishers are often unable to enforce copyright in digital works where breaches occur. In addition, a culture of free information has given rise to expectations of free content on the internet. As was already recognised by the turn of the century, "It is probable, given the free-spirited culture of the Internet and its attachment to the "public domain", that many users are simply unaware that works posted on the Net may be protected by intellectual property laws" (Jones 2000, 86). That perception continues today, as is evident from persistent breaches of copyright on the internet, such as the illegal downloading of films and television shows (see for example the *Dallas Buyers Club LLC v iiNet Limited (No 5)* [2015] decision).

There is also increased pressure on authors to forego payment for their publications by supporters of free content models. Earlier commentators such as Netanel (1996, 298) favoured a shortened copyright term, release into the "public domain" for creative

manipulation, and less control over derivative works by copyright owners, which would benefit the public interest. Lessig (2004, p. 293) also favours a shorter copyright term, a loosening of control and a more public benefit focussed approach, stating: "What's needed is a way to say something in the middle—neither 'all rights reserved' nor 'no rights reserved' but 'some rights reserved'—and thus a way to respect copyrights but enable creators to free content as they see fit" (2004, 277). A recent research study conducted with different types of creatives (Pappalardo et al. 2017) also shows that, in certain circumstances, copyright law can act as a deterrent to creation, rather than an incentive for it.

Of course, the danger of placing undue emphasis on public interest considerations by limiting the copyright term (in an effort to maximise public benefit) is that those very limitations may discourage creativity, by limiting financial incentives to authors. Unfortunately, this paradoxical consequence of an excessively robust public interest focus is often ignored by proponents of a strong public benefit pursuit.

Challenges in Digital Publishing

It is apparent that, while authors have benefited from increased publishing opportunities in the digital domain, one side effect of global dissemination is that copyright enforcement has become more onerous. The complexity of copyright law and licencing has been a stumbling block for many authors in asserting their copyright online. Furthermore, the tension between the rights of creators and public interest considerations have never been more evident than in the digital realm, which aims to make information freely available to the world at large. To protect a foundational tenet of copyright, namely the incentive to create, the issue of copyright protection for authors remains an important consideration in online publishing. Australian authors are becoming increasingly concerned about their copyright, as

was evidenced by their strong opposition to recent recommendations to relax certain provisions of the Act (Productivity Commission 2016).

One of these recommendations, namely the substitution of "fair use" for "fair dealing," would allow for the wider use of copyright material.[2] This author's earlier survey of Australian authors found that by 2014, almost 80 per cent of all respondents were concerned about their digital copyright (Cantatore 2014, 205). Today that number may have increased, considering the proliferation of unauthorised copying online. Most of the author concerns in that survey related to the issue of theft of creative work on electronic media or "online piracy."

These challenges have now escalated, due to the exorbitant cost of legal recourse and difficulty of pursuing offenders in other jurisdictions. In a paper delivered by Richard Hooper (2012) in Sydney, he recognised that there was a global battlefield between supporters of the notion that the internet should be free on the one hand, and the creative industries wanting to protect their intellectual property and copyright on the other. His UK-commissioned report, "Copyright works" (the Hooper report) was Richard Hooper's final report on the feasibility of developing an international Digital Copyright Exchange. The Hooper report included a feasibility study for a Digital Copyright Exchange, which was a key recommendation of the earlier UK *Hargreaves Report, Digital Opportunity: A Review of Intellectual Property and Growth, Research Report* (2011). However, this proposed initiative has not eventuated and the key concerns of copyright protection and licencing in the creative industries still remain a divisive topic.

[2] In the USA the concept of "fair use" allows for uses of copyright material that are considered fair in the circumstances; as opposed to the current closed list of permitted purposes for "fair dealing" in the Australian *Copyright Act.* There have been conflicting views on the viability and desirability of applying the "fair use" concept in Australian law.

It is significant that, although many authors have acknowledged that illegal online copying is a real concern for them due to the inadequacies of the current copyright structure, most have admitted to doing nothing to protect their copyright online (Cantatore 2014, 207). Several survey respondents specifically cited a lack of knowledge on e-book copyright as a problem and voiced concerns about a lack of time and funds to pursue copyright breaches on the internet. In addition, publishers did not provide a shield for authors against online copyright infringement, with most authors and publishers appearing to accept the inevitability of copyright infringements on the internet (Cantatore 2014, 207).

Authors who take protective steps may employ different measures to protect and regulate the use of their online copyright material, such as digital rights management (DRM) and Creative Commons (CC) licences to prevent the copying of their work. Some authors have expressed reservations about the use of DRM and have described it as a barrier to readers buying their books. Proponents of greater transformational use of copyright material also oppose these measures, proposing that excessive copyright control obstructs creative endeavour (see for example Suzor 2006, 2). Suzor has argued that "each appropriation is a limitation on the ability of future creators to work," which devalues the substance of the "no harm" argument in the realms of an ideal limitless creative environment (2006, 106).

The effectiveness of DRM can also be compromised by circumvention (Sims 2017a, 78). Many others feel that flexible licensing models—such as the CC—which recognise the author's moral rights and provide licensing options pursuant to section 189 of the Act, are useful as they set the parameters for authorised open access use. However, if these CC licence conditions are breached, authors are faced with the same dilemma of having to identify breaches and take enforcement steps.

Although the CC, a non-profit organisation, has been in operation for nearly two decades, many authors are not familiar with the concept. In the survey it was evident that interviewees who supported the CC were generally bloggers, who had more internet knowledge than those who had not previously published work online (Cantatore 2014, 207). Another significant drawback of the CC licensing scheme is that it does not prescribe licensing fees or financial remuneration for participants due to its voluntary character.

As an alternative protective measure, it was found in the survey target group that around 50 per cent of authors either post warnings on their websites or on the creative work itself or rely on their publishers to take care of copyright issues (Cantatore, 2014, p.207). Although representative organisations such as the Australian Society of Authors (ASA) continue to warn authors against piracy (Loukakis 2011a, 29), many authors lack the knowledge and means to take protective action.

Unsurprisingly, the problem with protecting online copyright is that it is usually not commercially viable for individual authors to pursue offenders in the case of a breach. International copyright protection is a grey area for most authors and taking legal advice is a costly enterprise. The 2014 survey findings (Cantatore 2014, 233) showed that the prohibitive costs of protecting their copyright and litigating overseas was a stumbling block for most Australian authors, and this is still evidenced by the absence of Australian copyright litigation on books.

Another problem for authors is a lack of cohesive thinking between authors themselves to lobby on copyright issues. The global environment has decentralised public forums, and apart from localised representative groups such as writers' groups and writers' organisations (e.g. the various State-based writers' centres), authors often fail to present a

“united front” or a “public voice” on pertinent issues such as copyright regulation, to harness their collective power as a group (Cantatore 2014, 234).

A 2011 report by the Australian Book Industry Strategy Group (BISG) recognised the problems associated with protection of digital copyright and the necessity for reform, stating that “the responsibility is with industry to invest, innovate, collaborate and improve competitiveness in order to secure the future of the Australian book industry (67). Furthermore, they suggested that the government should work with internet industries to adopt a binding industry code on copyright infringement by internet service providers, to protect online copyright. These recommendations were commendable, but would require not only a focused intention by the Australian Law Reform Commission (ALRC) and government to alleviate current digital copyright concerns, but also practical and enforceable measures, such as (yet unrealised) punitive sanctions and anti-piracy copyright education campaign proposed by the ASA as early as 2011 (Loukakis 2011b, 6).

The 2016 review by the Productivity Commission addressed digital copyright reforms, but the emphasis of the report was the introduction of public interest benefits (such as the extension of the fair dealing exceptions) (Productivity Commission 2016, 165), rather than protective measures for creators. The proposed reforms will align the Australian copyright approach with US provisions for “fair use,” and will create a wider range of copyright exceptions, especially relevant on the internet. It can be argued that the report fell short of dealing with vital concerns facing authors in the digital sphere.

In addition to digital copyright concerns, there also exist increased problems regarding the collection of royalties internationally. In the research referred to earlier (Cantatore 2014) a number of authors voiced the concern that copyright measures and royalty schemes based in Australia did not sufficiently address the issue of loss of revenue from

overseas sources, such as sales on the internet, and copyright infringements that occurred overseas. This concern appeared to be fuelled by the blurring of territorial copyright zones as a result of new media structures and the expanding use of electronic devices. It was further evident that these problems were exacerbated as online publishing became more prevalent and territorial borders became less defined (Cantatore 2014, p. 233).

It is, however, important to acknowledge that many authors do not favour a hard-line enforcement of electronic copyright. There is a group of authors who view the internet as a marketing opportunity, and either employ "soft" licensing practices such as the CC or who provide their creative work not only DRM free, but also free of charge. These "trailblazers" have been receptive rather than resistant to change and have sought to embrace new business models in the light of online publishing and proprietary branded electronic readers such as Kindle.

Thus, there are two ways of thinking which emerge in the digital sphere: those who take a more conservative and protective view of copyright and authors' entitlements, and those who support unlimited transformative use and the "free" and "sharing" culture of the online media through alternative business models. It has also become apparent that licensing terms and conditions are becoming paramount in the digital milieu, especially in relation to e-books, such as Kindle. This trend reflects the earlier observations of authors John and Reid (2011) that owners' and users' copying rights are now being determined more by individual licenses and less by provisions in copyright law than in the past. It is imperative that Australian publishers and authors apply close scrutiny to the terms and conditions of international electronic licensing agreements, such as Google and Kindle agreements, to avoid the power of the individual—both authors and localised publishers—sliding backward as global publishing giants advance forward.

Territorial Copyright

1. Territorial Copyright Challenges

Considering the rapid developments in technology over the past twenty years, the digital sphere has made it increasingly difficult to cling to existing copyright models, leaving traditional territorial copyright protection in a state of flux. This is particularly evident in the dominance of online booksellers such as Amazon, who impact these rights by selling books across international borders. Notably, section 44F of the Australian *Copyright Act 1968* provides that there are no restrictions on importation of electronic literary works, except that it must be a "non-infringing copy" (i.e. made lawfully in the country of origin), thus significantly affording no parallel import protection on digital books (as opposed to print versions).

However, despite these issues, in Australia—as in the case of the United Kingdom and United States—territorial rights remain in existence. It is likely that authors will find it increasingly difficult to address infringements, considering the global reach of the online book market, and the associated jurisdictional problems. This trend points to a dilution of territorial rights, supporting those commentators who contend that the industry requires a new copyright infrastructure (Young 2007, 158–59).

Australian author and publisher Sally Collings expressed the view that the territorialism that existed in publishing for decades would become a non-issue as digital books became more prevalent (Cantatore 2014, 172). This viewpoint was supported by author and self-publisher John Kelly, who said that the possibility of self-publication has effectively removed traditional territorial barriers. He stated that self-publishers "have access to a world-

wide market by submitting their book to Google Books and Amazon and Lulu's websites, all available for a start-up cost of less than $100.00." On the issue of the deregulation of publishing and parallel importing, he said:

> The very nature of competition has been turned on its head and the once revered retail bookstore is staring its use-by date down the barrel just like the neighbourhood hardware store. But it isn't the threat of de-regulation that places it in this invidious position. The internet already has! One can debate the positive and negative impacts of this development, but it has nothing to do with government regulation. (Kelly 2009)

Kelly's observations are pertinent as he raised two issues: not only that of self-publication and the greater freedom it allowed, but also the fact that many books were bought online today across territorial copyright borders, rendering government regulation secondary to practical realities. These comments support the argument that the internet has expanded the boundaries of copyright protection and that current legislative structures may not offer authors the necessary protection in the digital economy, due to cross-jurisdictional publication. Despite the Productivity Commission's (2016) recommendations relating to abolishment of PIRs, and introduction of fair use exceptions, no changes had been implemented by 2018, and it remains to be seen what the effect of the recommendations will be.

The abolition of PIRs has been an ongoing debate in Australia for the past ten years and has consistently been opposed by authors and publishers (Productivity Commission 2016). There are divergent viewpoints between booksellers and consumer advocates on the one hand, and authors and publishers on the other. Commentators, such as Eltham (Cantatore 2014, 202), have questioned the effectiveness of dividing territories up geographically where digital rights are concerned, arguing that consumers should expect to have access to digital contents worldwide, irrespective of where they live. In addition, the possibility of

self-publication in the digital sphere has effectively removed traditional territorial barriers for authors, which raises issues around the efficacy of territorial regulation.

It is evident that most publishers have already come to the realisation that they need to acquire worldwide digital rights when they purchase a book and that authors and representative organisations such as the ASA have become acutely aware of the importance of worldwide digital rights (Loukakis 2011a, 29). A failure to acquire or protect worldwide publishing rights could erode any existing copyrights in view of global publishing practices.

2. The Significance of the Parallel Import Restrictions (PIRs) on Books

In Australia, the current parallel importation provisions allow a restriction on importation of printed copyright material into Australia, which provide Australian publishers with a thirty-day window to distribute a local version of a book (and ninety days to resupply) before competing overseas publishers may distribute the same product in Australia (*Copyright Act 1968* sections 102 and 112A). The US *Copyright Act 1976* (section 104) provides similar protections for copyright works of national origin.

The Australian PIRs were under review between 2006 and 2009, and again in 2016 (Productivity Commission 2009; 2016), with lobbyists advocating the removal of these restrictive provisions in the legislation. The Productivity Commission conducted an investigation into the nature, role and importance of intangibles, including intellectual property, to Australia's economic performance, as well as the effect of copyright restrictions on the parallel importation of books. During the initial Parallel Import Investigation, 268 submissions were put forward to the Productivity Commission by authors on the issue (Productivity Commission 2008).

In their submissions to the Productivity Commission, many authors provided examples of how they felt the current PIRs had benefitted them, or how the potential removal of the restrictions might affect them. For example, Australian author Nick Earls argued that allowing parallel imports would "undermine authors' incomes," "destroy the local market," and present "a serious disincentive towards Australian publishers publishing new Australian books" (Earls 2008, 8–9). Author Garth Nix pointed out that territorial copyright provided publishers with certainty, which encouraged them to invest in Australian authors and Australian books (Nix 2008, 7). Without that certainty, there would be less incentive to invest in Australian books, and consequently the opportunities for Australian authors would be fewer.

In addition, Thomas Keneally foresaw the gradual demise of the Australian publishing industry, cautioning: "Both authors and literary agents, particularly those whose interest is explicitly Australian, would be facing shrinking resources and contracts" (Keneally 2008, 4–5.) Many authors also stated that, in the absence of parallel import restrictions, they would lose control over the sales of their books. Once the rights to books were sold overseas, authors would no longer be able to control which edition of the book was sold in Australia, potentially impacting on their returns. Furthermore, some new or undiscovered authors could find it more difficult to gain attention in an open market (Productivity Commission Submissions 2009b). Despite the 268 author submissions (in addition to those of publishers and booksellers) against the proposed abolition of the PIRs, the Productivity Commission recommended that the Government repeal Australia's parallel import restrictions for books (Productivity Commission 2009).

However, the final result of the investigation was that the Government, under pressure from authors and publishers, rejected the recommendations of the Productivity Commission to phase out parallel import control, and instead retained the status quo. While the brief

euphoria of the Australian publishers and authors appeared to be well-founded, it has since become evident that the protective provisions in section 102 of the Act would not protect authors and publishers on an ongoing basis. Firstly, as noted above, the Act does not place any restrictions on importation of electronic literary works—except that they must be "non-infringing copies." Secondly, the PIR issue was revisited in 2016, and despite acknowledging that "(t)he Commission recognises that the cultural and educational value of books is significant" (Productivity Commission 2016, 150), the Productivity Commission has reiterated its findings that the PIRs on books should be abolished (Productivity Commission 2016, 152).

The Future of Copyright in Global Publishing

Evidently, many authors have recognised the need for new copyright solutions in a global environment, although the research has showed divergent views on the subject (Cantatore 2014; Pappalardo et al. 2017). Advocates for copyright protection suggest that authors should be more proactive in their approach to copyright, while others are of the view that the existing copyright structure is intrinsically insufficiently suited to copyright use in the digital domain (Cantatore 2014, 233). However, supporters of the changes recommended by the Productivity Commission to the *Copyright Act 1968*, hold the view that a more generous approach to the dissemination of copyright material is called for in a digitised world. Additionally, they dispute the effectiveness of the PIRs on books, saying that these measures are no longer suitable in the global marketplace where individuals can obtain overseas copies of books outside of the constraints of PIRs, and where digital publications are not regulated by the PIRs on books (Cantatore 2014, 203).

Transformative use has also remained an important issue of discussion, as evidenced by the 2017 Report by Pappalardo et al., which continues the debate by academics such as

Suzor (2006, 2), who claim that the transformative use of existing expression is beneficial for society. These arguments persist in supporting the proposal that copyright should be observed within the broader context of public benefit considerations and not solely as an advantage to the creator or originator.

The issue has become more pertinent with digitisation and the electronic media, maintaining the argument that copyright restrictions prevent the proper utilisation of creative expression for broader use in the interest of the public benefit. There is however some difficulty in formulating exact guidelines as to what constitutes "the public good" or "public benefit" in transformative uses such as parody and animation, both lauded as creative re-expression (Suzor 2006, 2). Fisher (2001, 183) has suggested that various considerations such as consumer welfare, access to information and ideas, and a rich artistic tradition be considered. While some copyright owners may agree with these considerations and value the transformative benefits gained by the limitation of copyright, others might not. The challenge continues to lie in reconciling these (sometimes) conflicting ideologies.

3. Cross-Border Publications and Cultural Impact

Although Australia applies PIRs, authors often experience problems with illegal parallel importation of their books from countries such as China or India. In these instances, it is difficult and expensive for authors to address breaches by offshore operators and internet marketers. Authors also do not benefit financially from remainder books that are sold at cost or below cost, as contracts generally provide that the author does not benefit once the book is sold by the publisher for less than the printing costs (Cantatore 2014, 184). This means that if a book by an Australian author is remaindered in the US and sold to a bookseller in Australia at a reduced cost, the author does not receive anything, even if the book is sold at full price in Australia.

Nick Earls experienced this problem when he discovered that copies of his novel *ZigZag Street* were being sold on remainder tables outside newsagents in Australia, in breach of copyright provisions. In this instance, his UK publisher had overstocked and copies of the novel found their way to a remainder house in the UK, where they were bundled up and sent to Australia with other books, in breach of his territorial rights. He recognised, however, that it was difficult to prevent this from happening or to stop the newsagents from selling the books, as they had bought the books in good faith, thinking that they were legally entitled to sell them (Cantatore 2014, 171).

Frank Moorhouse, another well-known Australian author, has also recognised the problems with regard to the collection of royalties internationally. “It is difficult to police copyright zones in English speaking countries,” he said, referring to the problems of international collecting agencies (Cantatore 2014, 170). He also supported the proposition that books were not mere commodities, having significant cultural value. He saw copyright zones as more than economic zones, rather as cultural zones that contribute to the development of cultural identity and protect cultural rights, and held the view that the removal of these protective barriers would be detrimental to Australian authors and publishers from a commercial point of view (Cantatore 2014, 170).

Earls has been equally concerned about these issues and has predicted that authors would suffer greatly if the PIRs were lifted. Although Australians would, for a time, have that book available at a price that the Australian market couldn’t currently match, he pointed out that it wouldn’t be cheaper for that long because eventually that stock would be exhausted, and the local publisher wouldn’t print more books because of the threat of it being undermined.

He also referred to the effect these activities would have on the cultural value of books.

> Particularly in the case of my American editions, they often change in hundreds of ways. Often in small ways, but hundreds none the less, from my Australian editions, which would spoil the reading experience in Australia. An Australian reading those books would notice things that didn't fit and it would take them out of the story and really affect the kind of reading experience they had. (Cantatore 2014, 171)

As examples, he referred to the use of the words "sidewalk" as opposed to "pavement," the use of "holiday" as opposed to "vacation," and the fact that American editions would refer to "college" instead of "uni" and in some instances, even change the names of towns and seasons in a novel. These changes impacted on the cultural experience of the Australian reader.

These authors' comments accord with the concern voiced by most of the 2014 research study interviewees that copyright measures and royalty schemes based in Australia do not sufficiently address the issue of loss of revenue from overseas sources such as internet sales and overseas copyright infringements. Additionally, there is a perceived loss of cultural values where Australian books are adapted to the culture and language associated with another country, printed overseas, and then imported into Australia.

Authors' concerns are thus fuelled by a number of issues: the blurring of territorial copyright zones as a result of new media structures (and the expanding use of electronic devices), unlawful imports of books printed overseas, and actions by global organisations such as Google, who has successfully defied traditional copyright expectations by publishing extensive excerpts from copyrighted works without permission in its scanning project under the fair use exception (The Authors Guild Inc. et al. v. Google, Inc. (2013) 954 F Supp 2d 282).

Former judge and author Ian Callinan has noted (Cantatore 2014, 173) that it would be difficult to resist "the tide of American culturalism." He used the example of the Australian High Court case *Gutnick v Dow Jones & Co Inc.* (2002) 210 CLR 575 (10 December 2002) to illustrate how copyright enforcement may be a problem when pursued in other territories. In that case, an American publisher defamed an Australian citizen on the internet and argued that the alleged defamation occurred at the place where the material had been uploaded onto the internet. However, the Court held that the defamation occurred where the material had been downloaded and read, namely Melbourne, and that the case had to be decided in that jurisdiction. Considering the global reach of the internet, this precedent could cause litigation costs to soar and could render copyright protection ineffective against parties in other jurisdictions (should it be found that the breach occurred in that country). Furthermore, Callinan was of the opinion that the exponential increase in the use of English in countries such as China would exacerbate copyright protection problems in the relatively small Australian market.

These viewpoints are illustrative of the legal difficulties associated with the globalisation of publishing, and the expenses that could be associated with prosecuting breaches of copyright. Authors' viewpoints also demonstrate the fact that the publishing in the global sphere has not only affected the enforcement of their copyright, but in many instances also the cultural impact of written works. It appears that, for the legislation to be effective, it may be necessary to adapt regulation of publishing practices in keeping with new cultural trends, such as the increase in demand for English books in non-English speaking countries like China, and the increased popularity of the online marketplace.

4. The *Kirtsaeng* Effect

The possibility of applying the "first sale doctrine" to books imported from another country, and then sold in the country of origin, as was the case in *Kirtsaeng v John Wiley & Sons* (2013), referred to earlier, put paid to the idea that territorial rights will necessarily protect US rights holders from the impact of cross-border sales. In Australian copyright law, there is no clear principle of first sale that positively permits the second-hand sale of copyright goods. However, in the context of physical goods, resale is generally not an infringement in Australia (Stevens 2016, 179).

In this landmark US case, Kirtsaeng, a Cornell University student, purchased mathematics text books from his home country, Thailand (with the assistance of friends), and then resold them on eBay to students in the US. The texts were English foreign editions and only authorised for sale in Europe, Asia, Africa and the Middle East. The issue to be decided was how section 602 (which prohibits the importation of works into the US without the copyright owner's permission) and section 109 (dealing with the first sale doctrine) of the *Copyright Act 1976* (US) to copies of books made and legally acquired abroad, and then imported into the US. The Supreme Court held by a six to three majority that US copyright owners may not prevent importation and reselling of copyrighted content lawfully sold abroad, due to the application of the first sale doctrine (*Kirtsaeng v John Wiley & Sons, Inc.* (2013), 1357–1358). The effect of the first sale doctrine (also referred to as an "exhaustion of rights"), is that the publisher's copyright is exhausted once a book is lawfully purchased.

It is significant that the Court read the *Copyright Act 1976* (US) as imposing no geographical limitation. This approach was in contrast to the lower court decision in *John Wiley & Sons, Inc. v Kirtsaeng* (2011) 654 F.3d 210. In the earlier decision, the Court had found in favour of Wiley, who relied on section 602 of the US *Copyright Act 1976* and argued that Kirtsaeng could not rely on the first sale doctrine (section 109) as it only applied to works manufactured in the US.

The six-to-three division in the Supreme Court decision is reflective of the controversy surrounding the interpretation and application of these two provisions in the Act. Previously, in the *Costco Wholesale* case (2010) 562 US 40 the Court was divided four–all on this issue, and in the earlier decision *Quality King* (1998) 523 US 135 the Court held that section 109 limited the scope of section 602, leaving open the question whether US copyright owners could retain control over the importation of copies manufactured and sold abroad (2013, 135).

In her dissenting judgment in *Kirtsaeng* Justice Ginsburg criticised the reasoning of the majority, stating that the majority's interpretation of the *Copyright Act 1976* (US) was "at odds with Congress' aim to protect copyright owners against the unauthorised importation of low-priced, foreign made copies of their copyrighted works" (*Kirtsaeng* 2013, 1373). She also expressed the viewpoint that "the Court embrace[d] an international-exhaustion rule that could benefit US consumers but would likely disadvantage foreign holders of US copyrights" (2013, 1385).

The Supreme Court in *Kirtsaeng* ultimately resolved the case in favour of permitting parallel importation by relying on the first sale doctrine. Despite the argument that this interpretation favours consumers by providing them with cheaper options, the flipside is that rights holders in written work could be disadvantaged by the erosion of their territorial rights. Principally, this decision illustrates how easily territorial copyright provisions may be circumvented, and the potential far-reaching impact on authors and publishers globally in the future.

Blockchain Solutions and Smart Contracts: A Copyright Utopia?

In recent years the rise of blockchain technology[3] has received some interest in the field of intellectual property (IP) management in the digital world. This has included a fascination with how blockchain technology and smart contracts[4] can be utilised to assist creators and publishers of digital content. This technology has seen a bourgeoning number of technology companies offering solutions for copyright owners. These companies often use blockchain technology, and many blockchains use "smart" contracts to regulate transactions. Automated smart contracts will be able to simultaneously represent ownership of an IP right and the conditions that accompany that ownership. These contracts can automate rules, check conditions and take actions with limited human involvement and cost. Currently the Ethereum blockchain is used for most smart contracts (Sims 2017b, 77).

It has been acknowledged that "blockchains are great tools for managing the ownership of assets and tracking the flow of money related to assets" (Gain 2016) and that it could potentially disrupt current media ownership business models. For example, it enables authors to sell digital copies of a book and receive royalties directly, instead of using online stores such as Amazon (Gain 2016). Industry professionals have stated that "blockchain has the potential to achieve copyright utopia, providing real-time transparency in relation to all of the information required to manage copyright" (Gilbert & Tobin Lawyers 2017, 5).

There are a number of companies in this space in varying stages of development, offering a variety of solutions, some focussing on music only (such as dotBlockchain Media, Muse Blockchain, Bittunes, Ujo and Mycelia), others are for copyright in visual images (such as Binded and Copytrack), and some that are multimedia focussed (such as SingularDTV,

[3] "A blockchain can be described as a database so secure that it can be made public, where altering a copy of the database has no effect and transactions can only be appended, never deleted or updated. Moreover, writing to the database is controlled by a peer-to-peer protocol that strictly enforces the validity of transactions before the transactions are appended" (Sims 2017b).

[4] Smart contracts have been described as "self-executing programmes that run on a blockchain" (Sims 2017b).

Mediachain and Veredictum.io). Additionally, companies such as the Decentralized News Network (DNN), provide opportunities for freelance journalists and bloggers to publish their content. DNN describes itself as "a news platform,[5] combining news creation with decentralised networks to deliver factual content, curated by the community" (DNN 2018).

Examples of two companies which have entered the marketplace with the view of providing a secure database for copyright owners, as well as a marketplace where they can trade or license their digital works, are Po.et and LBRY.

Po.et

Po.et states on its website that it is "a shared, open, universal ledger designed to record metadata and ownership information for digital creative assets" and it claims to ensure that metadata attribution remains safe, verifiable, and immutable by allowing content creators to timestamp their assets onto the Bitcoin blockchain. However, Po.et's functionality is currently limited to the distribution and licensing of written content, for publishers, journalists and digital content creators (Po.et 2017). It is currently only available on a test network, enabling authors to integrate their work with a free Wordpress plugin at <https://wordpress.org/plugins/po-et/>.

LBRY

LBRY (2018) describes itself as "a free, open, and community-run digital marketplace." The system equips "a peer-to-peer protocol with a digital currency and transparent decentralized ledger" and "the LBRY protocol opens the door to a new era of digital content distribution making peer-to-peer content distribution suitable for major publishing houses, self-publishers and everyone in between" (LBRY 2018). This model

[5] See https://dnn.media/.

allows for the publication and sharing of different types of digital content such as movies, photographs or books.

Advantages of these models are that creators will be able to set the terms of their contracts (to varying degrees) for payments or licensing fees payable by users, when they upload their work on the blockchain, enabling them to earn direct revenues from their creative works instead of small percentage royalties associated with large online publishers (Gain 2016). It also allows them to register their copyright in a secure database, which is searchable.

However, despite the perceived benefits of blockchain technology and smart contracts to protect digital copyright, some concerns have been expressed. Firstly, software and coding in smart contracts can be flawed and these flaws can attract hackers (The Economist 2016), contradicting the assurances of a safe and secure database promised by blockchain users. Secondly, if the code is regarded as a legal (smart) contract, so are any bugs in the contract, and changing them might mean a breach of contract (2016). Some of the problems associated with these models are that none of them offer total functionality on all levels necessary to protect copyright effectively, namely recording/registering of IP in creative work, ability to monetise/license the work, and monitoring of copyright breaches. There is no centralised platform for all creators that is easy to use – instead at this point in time, prospective users are provided with a range of options all requiring some specific technical knowledge. Currently these models appear to be targeted to publishers or creators who are involved in, or familiar with, technology and could exclude many individual creators. Increased functionality and offering a wider range of applications may improve the practical value of these initiatives to copyright owners on a global scale.

Another noteworthy initiative is CUSTOS Media Technologies (CustosTech) (https://custostech.com/), a company which focusses on tracking copyright infringements for videos, e-books, music, virtual reality and other media.

CustosTech

CustosTech provides a way of detecting the sources of leaked/pirated media, by imperceptibly marking each copy of a digital media file that is entrusted to a recipient. This "watermark" directly identifies the recipient. What makes the company unique, is that it rewards individuals in piracy networks across the world to report on pirated content. The concept is based on incentivising individuals (bounty hunters) who know where to find pirated content, and are rewarded when they find new infringements. This is done by embedding a reward in the form of digital currency (Bitcoin) directly in the copies of the media that are sent to recipients. When an anonymous bounty hunter claims the bounty, CustosTech can immediately detect the leak and inform the copyright holder of the infringer's details. This discourages infringers or uploaders to provide what is essentially a free service to the downloaders, since the downloaders expose them to risk of being identified.[6]

A disadvantage of the system for individual content creators is that it may still require them to go through the expense of legal action in other jurisdictions, where the infringements occur. However, CustosTech states that a viable solution could be takedown notices, where content owners (or their representatives) ask sites hosting infringing content to remove such content. The issuing of these takedown notices is often automated, sometimes with embarrassing results to infringers (CustosTech 2014, 9) which has a deterring effect.

[6] https://custostech.com/tech/

CustosTech operates in conjunction with online publishing platform Erudition[7], whose piracy detection fee starts at £100 per title per annum fee to cover the set-up, platform licensing and monitoring process.

An advantage of the CustosTech system is that it is user-friendly for copyright owners and does not require special tech knowledge, as the Bitcoin and blockchain form a part of the back-end of the technology. One commentator has observed that "Essentially, the Custos system is designed to attack the economy of piracy by targeting uploaders rather than downloaders, turning proactive downloaders into an early detection network" (Whigham 2018). Whigham also commented that "it remains to be seen if this type of technology-driven approach becomes widely adopted by content owners but at the very least it's an interesting new tactic to combat illegal file sharing" (2018).

Conclusion

It has become evident that the traditional application of territorial copyright and PIRs no longer serve to protect copyright holders, due to the impact of digital sales and the application of the first sale doctrine in the US to printed books. For now, PIRs apply to printed books in Australia, but they are ineffective in the digital world, and can be circumvented by secondary sales of printed books. It is apparent that new copyright solutions are required, which require authors and publishers to continually embrace digital technology, improve their knowledge of online publishing and apply alternative creative publishing models. Although DRM has been criticised by some as being too restrictive, for many authors and publishers its use has been instrumental in protecting their copyright online.

[7] https://www.eruditiondigital.co.uk/

While there have been efforts such as the UK Copyright Hub[8] to harmonise and share online data, the technology and process landscape around rights remains fragmented (Cox 2017). Free models such as the CC[9] have also gained limited support in the global context. Despite the provisions of the Berne Convention, the enforcement of copyright in the digital domain remains fraught with difficulties.

In respect of copyright management and tracking infringements, smart contracts on the blockchain system may provide solutions but come with their own challenges, and many of the companies offering these solutions are still in developmental stages. Some of these models are also closely tied to cryptocurrency use and payments, which may require special knowledge on the part of the user. This could deter individual authors and content creators who may prefer more user-friendly models.

However, the blockchain system promises to revolutionise the way in which IP rights (including copyright) will be managed in the future. Sims (2017a) has pointed out that the blockchain can contain licensing terms, automatic royalty payments, notifications of when the licencing term expires, and that visibility to all parties (or potential parties) will limit potential problems with territorial rights clashes. Gilbert &Tobin Lawyers (2017) have stated that

> (w)hile many of the preceding examples are still in development, it is our view that blockchain is the most significant technical and commercial revolution to emerge in the last 20 years. We are bordering on the precipice of copyright utopia, as the potential expands for blockchain to substantially re-engineer the complexities of copyright management, with far greater transparency, simplicity and rigour. (10)

[8] http://www.copyrighthub.org/
[9] https://creativecommons.org.au/

The issues highlighted in this chapter are indicative of changing copyright expectations in the digital sphere during a critical time of technological progress. Copyright has historically had a reactive, rather than proactive, approach towards changing technology, as copyright laws have traditionally adapted to technology to meet the needs of copyright users. This mindset has resulted in deficiencies which could affect creators adversely, and a more hands-on approach may be necessary. Primarily, authors need to equip themselves to deal with the challenges of new media technology to ensure that they are adequately rewarded for their creative efforts, and to exert power as a significant stakeholder group in the digital environment. How authors and content creators cope with these changes in a global marketplace depends on how effectively they expand their knowledge of the different options available to them, and how successfully they utilise the opportunities that arise because of technological change.

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